(2)

No. 90-1224

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In The
Supreme Court of the United States
October Term, 1990

MARK J. CONTRERAS, DONNA A. CONTRERAS and ROBERT SCHMIDT,

Petitioners,

vs.

CITIBANK (SOUTH DAKOTA), A NATIONAL BANKING ASSOCIATION, WILK & WALLER, an Illinois Partnership, RANDY KADET, SCOTT MARKS, MARILYN KADET, and ACCURATE PROCESS SERVICE,

Respondents.

On Petition For A Writ Of Certiorari
To The Appellate Court Of Illinois,
First Judicial District

BRIEF IN OPPOSITION OF RESPONDENT WILK & WALLER

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QUESTIONS PRESENTED

Whether the decision of the Illinois Appellate Court that an Illinois trial court is not empowered to sit in review on another Illinois trial court, that the provisions of the Illinois Code of Civil Procedure govern the conduct of civil litigation in the state courts, and that the Illinois law prohibits litigant forum-shopping invokes this Court's jurisdiction or merits its review.

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BRIEF IN OPPOSITION OF RESPONDENT WILK & WALLER

Respondent respectfully requests this Court to deny the petition for a Writ of Certiorari for the reasons set forth below

COUNTERSTATEMENT OF THE CASE[1]

Plaintiffs, Mark and Donna Contreras and Robert Schmidt, were extended credit privileges by Citibank. Plaintiffs used those credit privileges and incurred debt to Citibank. The debts which

[1] The Illinois law requires fact pleading and rejects conclusions. The facts of record in this cause, which involves a dismissal pursuant to Section 2-615 of the Illinois Code of Civil Procedure are established by the well-plead facts of plaintiff's First Amended Complaint only, inclusive of exhibits thereto.

plaintiffs admittedly owed to Citibank were not paid and Citibank was forced to bring suit against the plaintiffs seeking payment of those monies (C 292)[2]. The plaintiffs allege that an inconsistent or false affidavit of service was filed in the Cook County municipal court actions brought against them as defendants by Citibank (C 293). They further allege "on information and belief" that the affidavits of service were filed by this defendant, Wilk & Waller (C 293). Plaintiffs do not allege that this defendant prepared the affidavits of service or participated in any manner in their preparation. Further, there is no allegation that this defendant instructed the private process server with regard to service in the municipal actions or the preparation of the affidavits of service.

Judgment was entered against Mark and Donna Contreras on August 25, 1987, in municipal action 87 M1 30654, for the amount they owed to Citibank (C 297). The Contrerases do not contest that they owed the money to Citibank or that they failed to pay it. The municipal action brought against them by Citibank was well grounded and they admit they had no defense to it.

Similarly, Robert Schmidt does not contest that he owed the money to Citibank or that he failed to pay it prior to municipal action 87 M1 102541 being brought against him. Schmidt does not plead that he had a meritorious defense to Citibank's action against him. Judgment was entered against Schmidt and in favor of Citibank on May 19, 1987 (C 299).

Schmidt never contested the entry of judgment against him in the municipal action. Taking his affirmative allegations as true, Schmidt settled the matter, paying the judgment against him voluntarily. On July 10, 1987 a release of the judgment against Schmidt was filed. Further, a stipulation to dismiss the garnishment was prepared by Wilk & Waller and filed by Schmidt's employer, the Chicago Park District, on August 18, 1987 (C 299; C 177). Schmidt does not allege that his wages were ever in fact garnished.

Mark and Donna Contreras retained the services of attorney Peter A. Regulski (the plaintiffs' attorney herein) with regard to the municipal action brought by Citibank against them in the Municipal Court of Cook County. On September 24, 1987,

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[2] The citations herein reference the common law record.

attorney Regulski filed a Motion to Vacate the judgment entered against the Contrerases on August 25, 1987 in the municipal court (C 116). The motion to vacate was brought pursuant to Section 2-1301 of the Illinois Code of Civil Procedure (C 116). On behalf of the Contrerases, attorney Regulski noticed that motion for an initial hearing date of October 1, 1987 at 2:00 p.m. (C 115).

On October 1, 1987, attorney Regulski appeared before the Honorable William D. Kelly in a municipal courtroom of the Daley Center and presented and argued the merits of the Contrerases' motion to vacate under Section 2-1301 (C 182; C 190). In oral argument on that motion, Judge Kelly inquired as to whether the Contrerases had a meritorious defense to Citibank's action against them (C 186). No meritorious defense was stated for the record at that time. Consistently, plaintiffs Mark and Donna Contreras plead in the instant action that they in fact were in arrears and owed the money to Citibank.

After Judge Kelly indicated that he would continue the Contrerases' motion under 2-1301 from October 1, 1987 to October 15,1987, attorney Regulski sought leave to file instanter a Special and Limited Appearance on behalf of Mark and Donna Contreras and a Motion to Quash Service of Summons, typed documents which he had previously prepared (C 189; C 192). Attorney Regulski also initiated a Petition for a Rule to Show Cause on the private process server under Section 2-203 of the Illinois Code of Civil Procedure (C 194). Plaintiffs' motion to vacate under Section 2-1301 was continued to October 15th at 2:00 p.m. by court order (C 188).

On October 13, 1987, Mark and Donna Contreras, through attorney Regulski, filed a Motion for Leave to Withdraw their Petition for a Rule to Show Cause against the private process server (C 217) and an amended Motion to Quash (C 196).

On October 15, 1987 at 1:18 p.m., attorney Regulski filed the instant Chancery action in the Chancery Division of the Circuit Court of Cook County, Illinois[3]. At 2:00 p.m. on the same date, attorney Regulski appeared in the municipal courtroom and

[3] The Cook County Court system is organized into numerous separate divisions. Among these, the Municipal Division handles claims for less then $15,000.00, and the Chancery Division handles various claims in equity, declaratory actions and class actions.

offered to pay the outstanding balance owed by Mark and Donna Contreras to Citibank, in full settlement and release of the municipal action brought by Citibank (C 74-75). Attorney Regulski issued his personal check on his own account for the sum owed by his clients, Mark and Donna Contreras. The check was written in the presence of Wayne Waller in the municipal courtroom on October 15, 1987 at approximately 2:30 p.m. (C 75). Thereafter, in lieu of proceeding on any of the motions he had filed on behalf of Mark and Donna Contreras in the municipal action, attorney Regulski tendered a typed order dismissing the municipal cause of action by agreement (C 112).

The typed, agreed order dismissing Citibank's claim against Mark and Donna Contreras was entered on the 2:00 motion call in municipal court, on October 15, 1987 (C 112). At that time, attorney Regulski withdrew all previous motions filed on behalf of Mark and Donna Contreras and negotiated a settlement of Citibank's claim against the Contrerases. Forty-two minutes earlier, at 1:18 p.m. on October 15, 1987, attorney Regulski had filed the instant Chancery litigation (C 02).

In the instant action, this defendant, Wilk and Waller, filed a motion to disqualify attorney Regulski and a motion to dismiss Mark and Donna Contreras as representative plaintiffs. The disqualification of attorney Regulski was premised on his payment of the Contrerases' debt to Citibank with his own personal check in violation of Canon 5 of the applicable Code of Ethics (C 69-73). The motion to dismiss Mark and Donna Contreras as representative party plaintiffs was premised on their voluntary submission to the jurisdiction of the Municipal Court on October 1, 1987 and their settlement of the claim of Citibank against them. The motion further noted the problem of two simultaneously pending actions on the same issue, one in the Municipal Division and one in Chancery (C 77-81).

Briefs were submitted and a contested hearing was held with regard to this defendant's motion to disqualify and its motion to dismiss the Contrerases as party plaintiffs. In reviewing those motions, the Chancery Court necessarily reviewed the plaintiffs' original Complaint. Although Judge Green denied the pending motions, the plaintiffs' original Complaint at Law was dismissed *sua sponte* under Section 2-615 for failing to state a cause of

action. The court specifically focused on plaintiffs improper request for relief, stating:

> Moreover, this is not a Court of Appeals, and neither party has addressed the propriety of a collateral attack on the judgments obtained in the Municipal Court. This court concludes, therefore, that the plaintiff is not barred from asserting the facts presented as they related to the scheme of fraud, but the plaintiffs cannot ask this court to vacate the judgments in the Municipal Court or declare them void. (January 27, 1988 R.P. 15).

Plaintiffs were granted leave to file a First Amended Complaint.

Plaintiffs' Motion for a Reconsideration of the Chancery Court's *sua sponte* dismissal of the original Complaint was denied on March 29, 1988, after briefs were submitted and a contested hearing was held. The Chancery Court again indicated that the plaintiffs' request for relief was improper, stating:

> In dismissing this matter previously, this court made clear that its not to be substituted as a court of review. That is not its proper role. (March 29, 1988 R. P. 6).

On April 12, 1988, plaintiffs filed a First Amended Class Action Complaint (C 290 - 316). The factual allegations of the First Amended Complaint were virtually identical to those of the original Complaint. Count I of the original Complaint, which sought a declaration from the Chancery Courts that multiple municipal judgments were void, was not plead again in the First Amended Class Action Complaint.

Plaintiffs' First Amended Complaint contained seven counts. The factual allegations for each of the seven counts were the same. Count I alleged a violation of 42 U.S.C. Section 1983 and labeled itself as a conspiracy count (C 301). Count II duplicated the allegations of Count I that 42 U.S.C. Section 1983 had been violated, but deleted the charge of conspiracy (C 304). Count III alleged a common law fraud (C 305). Count IV alleged a violation of the Illinois Consumer Fraud and Deceptive Practices Act (C 308). Count V alleged an "implied cause of action" under Section 2-203 of the Illinois Code of Civil Procedure (C 309). Count VI was premised on Section 12-817 of the Illinois Code of Civil Procedure (C 311). Count VII was labeled as a negligent hiring and failure to supervise count (C 312).

Each of the seven counts of plaintiffs' First Amended Complaint sought the following relief:

a) compelling Citibank to return any and all money obtained as a result of said void judgments with statutory interest thereon from the date of collection (except in the case of Mark J. and Donna A. Contreras);

b) compelling Wilk & Waller to return any and all money obtained for costs and attorneys fees as a result of said void judgment with statutory interest thereon from the date of collection (except in the case of Mark J. and Donna A. Contreras);

c) awarding the plaintiff class compensatory damages in the amount of $2,500.000.00;

d) awarding the plaintiff class punitive damages in the amount of $5,000,000.00; and

e) granting the plaintiff class such relief as this Honorable Court deems just and appropriate, including, but not limited to, costs and reasonable attorney's fees.

Each of the defendants filed a motion to strike and dismiss all seven Counts of the plaintiffs' First Amended Complaint. The motion of this defendant filed on April 28, 1988 challenged the plaintiffs' request for relief in each of the Counts as wholly improper, in that it sought return of money obtained because of void judgments. The request for relief by its nature required a determination that the judgment was in fact void and sought an order which effectively vacated the judgment. This defendant further contested the factual sufficiency of each of plaintiffs' Counts under Section 2-615 of the Illinois Code of Civil Procedure (C 323 - 332).

After reviewing briefs submitted on the issues, the Chancery Court held that each Count of plaintiffs' First Amended Complaint was factually insufficient and that each Count improperly prayed for relief which the Chancery Court could not grant. The court specifically stated:

> Although plaintiff argues otherwise, this court has determined that by way of the nature of the relief prayed for, returning sums obtained through the "void" judgments, plaintiff continues to ask for relief which it is not empowered to grant. That is a determination that the default judgments rendered in the Municipal Division are void. This is akin to vacating those judgments.
>
> (R.P., July 26, 1988, p. 18).

Leave to file a Second Amended Complaint was extended to the plaintiffs. The Chancery Court granted plaintiffs 28 days in which to file a Second Amended Complaint (C 411).

On September 2, 1988 plaintiffs were granted an extension of time in which to file a Second Amended Complaint (C 416). On September 13th, plaintiffs were granted another extension of time in which to file a Second Amended Complaint (C 421).

Plaintiffs elected not to file a Second Amended Complaint. On September 27, 1988, plaintiffs filed an election to stand on their pleadings and a motion for a final order of dismissal (C 424 - 427). An order prepared by counsel for the plaintiffs was submitted on October 14, 1988 and entered (C 432).

While the cause was styled as a class action at the trial level, no class was ever certified by the trial court[4]. The trial court therefore did not address the claims of the class, but merely the claims of those individual plaintiffs before it.

A timely notice of appeal from the October 14, 1988 order of dismissal was filed by the plaintiffs. Thereafter, briefs were filed by the parties and oral argument was heard. On May 18, 1990, the First District Appellate Court affirmed the dismissal order of the trial court on the basis that each Count of plaintiff's First Amended Complaint sought relief that the trial court was not empowered to grant. Addressing that issue, the First District Appellate Court stated:

> In effect, the three named plaintiffs asked the chancery division to review the municipal division's action. We find no law permitting such a review.

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[4] Plaintiffs erroneously refer to a class action in the briefs and argument. A class was never certified and only the claims of the individually-named plaintiffs were at issue.

> Plaintiffs are not seeking to enforce the judgments in the underlying suits. Instead, they are seeking to sidestep the municipal division's decision in regard to the default judgments by going over to chancery as an alternative forum. Plaintiffs' attempt to rely on collateral attack here is merely forum shopping, which is not permitted under the law.

The First District Appellate Court affirmed the trial court's dismissal, holding that the Illinois trial court is not empowered to sit in review, that the Code of Civil Procedure governs the conduct of civil litigation and that the plaintiffs were engaged in forum shopping. Because each of plaintiffs' seven counts sought identical relief, each count was subject to dismissal for the same reason. Therefore, the First District Appellate Court did not reach or address the issues of the factual insufficiency of each count in the opinion it rendered.

Plaintiffs filed a timely Petition for Leave to Appeal with the Illinois Supreme Court which was denied on October 2, 1990.

REASONS FOR DENYING THE WRIT

I.

THE RULING OF THE ILLINOIS APPELLATE COURT ADDRESSED THE PROCEDURAL IMPROPRIETY OF THE PLAINTIFFS' CAUSES OF ACTION ONLY, AND FAILS TO INVOKE THE JURISDICTION OF THIS COURT.

In seeking review of this Court, Plaintiffs posit that the interpretation of 42 U.S.C., Section 1983 was at issue in the underlying Illinois Appellate Court decision. The rationale and holding of the Illinois Appellate Court is clearly to the contrary. In its decision, the Illinois Appellate Court declines to address the factual insufficiency of any of the Plaintiffs' seven counts, inclusive of the two counts purportedly predicated on Section 1983. In affirming the trial court's dismissal of the plaintiffs' complaint, the Illinois Appellate Court focused on the procedural impropriety, highlighted by plaintiffs' repeated prayer that the Chancery Court order a return of voluntarily paid municipal court judgments.

By its nature, plaintiffs' prayer for relief required the Chancery Court to sit as a court of appeal and review over the municipal courts which had entered the judgments. The Appellate Court agreed with the Chancery Court that it was not empowered to review. On this basis the dismissal of all of the plaintiffs' counts was affirmed.

The first four issues which plaintiffs frame as "Questions Presented" to this Court were neither presented to nor decided by the Illinois Appellate Court. The Appellate Court addressed the Section 1983 counts in the same manner as plaintiffs' other state law counts: each count prayed for relief that the trial was not empowered to grant and therefore each was appropriately dismissed.

The Illinois Appellate Court did not hold that a litigant "must exhaust" state court remedies as a pre-requisite to a Section 1983 action or that a default judgment cannot be vacated in the absence of a meritorious defense. The Appellate Court never mentioned the doctrine of collateral estoppel in its decision, nor did the plaintiffs argue in that vein at the Illinois appellate level.

The Appellate Court did hold that a Section 1983 action cannot be used to request vacatur of a judgment. The power to vacate a trial court judgment rests with the trial court which entered it and with the empowered courts of review, within the guidelines of codified procedure. To hold otherwise encourages litigant forum shopping and "could lead to displacing almost all of the civil law of the states into the federal courts" . *Del's Big Saver Foods, Inc. vs. Carpenter Cook, Inc.*, 795 F. 2d 1344 (7th Cir 1986). Such a result places the integrity of the state court system in jeopardy, subject to the whim of a litigant who has a simple avenue for complete relief open to him under state law.

The decision of the Illinois Appellate Court centered on state procedural law. The validity of a federal right was not at issue. This court's jurisdiction is not invoked and the instant petition should be denied.

II.

THE ILLINOIS APPELLATE COURT PROPERLY HELD THAT THE POWER TO REVIEW AN ILLINOIS TRIAL COURT DECISION IS RESERVED TO THE APPELLATE COURTS AND SUPREME COURT OF THE STATE OF ILLINOIS.

The essential issue on which the Illinois Appellate Court decided the instant appeal is whether a trial court has the power to vacate the judgment of another court of concurrent or parallel jurisdiction. Plaintiffs' original Complaint in Chancery sought an order vacating the judgments entered against them in the Municipal division trial courts. The First Amended Complaint sought an order declaring those judgments void and compelling a return of the money obtained as a result of "said void judgments". The Chancery Court rejected both Complaints because of the nature of the prayer for relief plead by the plaintiffs. It refused to review the proceedings of its sister court to determine either jurisdictional issues or the propriety of the entry of judgments in that court. The Chancery Court repeatedly noted that relief from the judgments of the Municipal division was available in the Municipal division trial court. Plaintiffs however refused to return to the trial courts which had entered the judgments against them, but opted to initiate an appeal.

Plaintiffs' cause of action was dismissed pursuant to a motion under Section 2-615 of the Illinois Code of Civil Procedure, which by its procedural nature concedes the truth of all well-plead facts. At the trial level and at the appellate level, the defendants accepted those facts as true. Further, the recitation of facts in the Appellate Court's opinion demonstrates that those facts were reviewed in detail by it.

Due process is not an issue in the case at bar. The United States Supreme Court decision of *Peralta v. Heights Medical Center, Inc.*, 484 U.S. 80, 108 S. Ct. 196 (1988), on which Plaintiffs rely, can be contrasted with the instant case. In *Peralta*, the Texas rules of civil procedure operated to deny a defendant who had never been served an avenue of relief in the trial court. The United States Supreme Court held that the Texas statutory scheme as implemented violated due process of law.

The Illinois rules of civil procedure do not operate with that effect. The actions taken by attorney Regulski on behalf of the Contrerases in the municipal action demonstrate that Illinois law always allows an avenue of relief where service is improper. In fact, Mark and Donna Contreras filed a special and limited appearance and a motion to quash in the municipal trial court in an attempt to obtain relief from the judgment which had been entered against them (C 189; C 192). Unlike the *Peralta* case, the Illinois statutory scheme is designed to safeguard due process. Simultaneously, Illinois procedural law protects the integrity of the judiciary and prohibits forum shopping.

The Illinois Code of Civil Procedure provided various methods by which the plaintiffs could have pursued relief in the municipal division. The codified Illinois law consistently protects rights of due process. Plaintiffs voluntarily abandoned the municipal division trial courts. In truth, their complaint is not raised against a denial of due process, but rather against the long-recognized rule of the Illinois law that a litigant is not allowed to forum shop. Enforcement of that rule by the Chancery Court and the First District Appellate Court was proper.

The approach of the Illinois law to judge shopping does not merit the attention of this court. The Supreme Court of Illinois iterated its stance on litigant forum shopping in the 1983 decision of *Balciunas v. Duff,* 94 Ill.2d 176 (1983). The standard of the Illinois law is set out clearly in that decision. Plaintiffs' efforts to disguise forum shopping by styling a law suit as either a Section 1983 action or a class action does not render it more palatable to the court.

Plaintiffs assert that state procedural law must yield to federal rights and rely on *Robertson v. Wegmann,* 436 U.S. 584 (1978). *See* plaintiffs' Petition, at 14. Their reliance is misplaced. In *Robertson,* the State's restriction on survivorship rights was recognized, resulting in an abatement of an otherwise viable Section 1983 action. 436 U.S. 584, 592. The *Robertson* decision demonstrates that unless the state procedural law operates to violate a constitutional right, it is fully enforced by the federal courts.

The Chancery Court and the First District Appellate Court were correct in holding that plaintiffs' request that one trial court

review the decisions of a trial court of parallel jurisdiction was procedurally improper. The pivotal issue in this case was procedural. The Chancery Court and the Appellate Court adhered to the Illinois law in refusing to allow a trial court to sit in review, in prohibiting litigant forum shopping and in allowing the provisions of the Illinois Code of Civil Procedure to govern the conduct of the litigation.

III.

THE CHANCERY COURT CORRECTLY RECOGNIZED THAT IT WAS NOT EMPOWERED TO VACATE OR DECLARE VOID A JUDGMENT OF THE MUNICIPAL COURT.

The Circuit Court of Cook County is divided into numerous divisions, in accordance with the type of claim being made and in some instances the amount in controversy. For example, personal injury claims in excess of $15,000.00 pend in the Law Division. Similar claims for less than $15,000.00 pend in the Municipal Division. Property damage and contract cases also fall within the scope of the Municipal Division but are generally assigned to a separate set of court rooms. Other divisions such as Domestic Relations, Criminal and Probate handle cases of a specific nature as denoted by their titles.

The Chancery Division of the Circuit Court of Cook handles a particular type of litigation, inclusive of a foreclosure action on real property, a suit for a declaration of rights under an insurance contract and class action litigation.

There is no Cook County Circuit Court rule which attempts to grant the Chancery Courts the power to review the rulings of the courts of other divisions. Similarly, the Illinois Code of Civil Procedure contains no provisions which grant the Chancery Court or any court of equity the power of review. Finally, the common law does not bestow any right on the Chancery Court to review the judgments of a court of parallel jurisdiction.

The right to review the decision of a trial court is held by the Appellate Courts and the Supreme Court of Illinois. To pursue an appeal from a Trial Court order and obtain a review, certain procedural rules must be followed. *See,* Ill. Rev. Stat. ch. 110(ā), par. 301, *et seq.* Strict adherence to the rules is requisite to the

appeal and review process. *See, e.g., Elg v. Whittington,* 149 Ill. App.3d 307 (1986), aff'd 119 Ill.2d 344 (1987).

The named plaintiffs in the case at bar alleged that judgments were entered against them in certain Municipal Court actions. In Count I of their original Complaint in the Chancery action, and in each count of the First Amended Complaint, plaintiffs requested the Chancery Court to vacate the judgments entered against them in the Municipal Courts, to declare the judgments void and to order a return of the monies plaintiffs paid voluntarily to satisfy those judgments. After reviewing plaintiffs' pleading with regard to other pending motions, the Chancery Court *sua sponte* dismissed plaintiffs' original Complaint at Law because it requested relief which the court was not empowered to grant. In addressing the sufficiency of the First Amended Complaint, the Chancery Court again held the prayer for relief in each Count improper. Specifically noting that it was not a court of appeal and had no powers of review, the Chancery Court stated that it could not vacate the judgments of the Municipal Court or declare them void.

Plaintiffs imply by their statement of the questions presented to this Court that the Chancery Court gave the municipal judgments " collateral estoppel" effect, i.e. that it presumed the judgments were valid. To the contrary, the Chancery Court refused repeatedly to rule on the issue. Collateral estoppel was never applied.

The Chancery Court's recognition that it could not vacate or declare void a judgment of the Municipal Court was correct under the law. The procedural rules of the State of Illinois provide numerous avenues for vacating a judgment at the trial court level. Plaintiffs' contention that those rules can be ignored and that the common law doctrine of collateral attack is sufficient to allow one court of parallel jurisdiction to sit in review on another is legally ill-premised. Moreover, acceptance of such a theory would play havoc with the current court structure in Cook County and the entire State. The Chancery Court cannot review or reverse the Municipal Court. The Chancery Court was correct in recognizing the limitations of its powers and dismissing the plaintiffs' claim for relief.

Acting in its designated role as a court of review, the Illinois Appellate Court affirmed the Chancery court's decision. It rejected the plaintiffs' argument affirmatively and held that the common law doctrine of collateral attack cannot be employed to nullify the codified procedural rules of the State of Illinois.

A.

THE PROVISIONS OF THE ILLINOIS CODE OF CIVIL PROCEDURE OUTLINE THE APPROPRIATE PROCEDURE FOR VACATING A JUDGMENT AT THE TRIAL COURT LEVEL.

The provisions of the Illinois Code of Civil Procedure are comprehensive in nature and designed to protect the rights of all litigants. Two specific sections of the Code outline avenues of relief from a judgment entered. A separate provision outlines the appropriate procedure for contesting the jurisdiction of the court over the person of the defendant. In contrast, the Code does not outline a procedure which allows a Chancery Court to review the propriety of judgments entered by a municipal or small claims court.

Within 30 days of the entry of a judgment, a litigant may move the court under the provisions of Section 2-1301(e) to vacate the judgment "upon any terms and conditions that shall be reasonable." Ill. Rev. Stat. ch. 110, par. 2-1301 (1983).

After the passage of 30 days, a litigant can apply for relief from a judgment under the provisions of Section 2-1401 of the Code. Ill. Rev. Stat. ch. 110, par. 2-1401 (1982). Section 2-1401, allows a party to apply for relief from a judgment order which is over 30 days old within two years after the date of entry of the order of judgment. The requisites under Section 2-1401 are specific. *See, e.g., Armis Construction Co. v. Cosmopolitan National Bank,* 134 Ill. App.3d 177 (1985). The 2-1401 petition must be filed in the same proceeding in which the judgment was entered and must be supported by affidavit. *Lofendo v. Ozog,* 118 Ill. App.3d 237 (1983).

Where a litigant seeks to contest the jurisdiction of the court over his person, a special and limited appearance may be filed in accordance with the dictates of Section 2-301 of the Code. Ill. Rev. Stat. ch. 110, par. 2-301 (1982). This Section allows a party to contest the court's jurisdiction over him and adduce evidence

on that issue. A special and limited appearance can be made post-judgment to contest the jurisdiction of the court. *Washington v. Clayter,* 91 Ill. App.3d 489 (1980). A determination by the court that it did not have jurisdiction over the person at the time the judgment was entered, renders the judgment of no effect. *LaMotte v. Constantine,* 92 Ill. App.3d 216 (1980).

Each of these provisions of the Illinois Code of Civil Procedure outlines the proper method for vacating a judgment or contesting the jurisdiction of the court. The named plaintiffs had the full opportunity to move the Municipal Court under any of those sections for relief, if they felt they were so entitled. In fact, Mark and Donna Contreras, through their attorney, Peter Regulski, presented a motion to vacate under Section 2-1301 and a subsequent motion to quash, erroneously brought under Section 2- 203 (C 116; C 90). Prior to the Municipal Court determining either of the motions, the Contrerases opted for an agreed order of settlement. Significantly, the chancery "class action" which requested the Chancery Court to review the Municipal Court judgments was filed approximately one hour before the Contrerases opted to abandon their motion to vacate under the Code and enter an agreed order of settlement in the municipal case (C 02 [Chancery Complaint filed 1:18 p.m. on October 15, 1987] and C 112 [order entered on 2:00 p.m. motion call in municipal court]). In essence, the Contrerases ultimately requested the Chancery Court to review an order of the Municipal Court which they declined to allow the Municipal Court itself to reconsider under the applicable procedural provisions. The Contrerases took the issue away from the Municipal Court, which had entered the judgment, and attempted to bring it to the Chancery Court in the form of a class action. The Chancery Court correctly recognized the impropriety of the procedure. It informed the plaintiffs emphatically and repeatedly that it would not sit as a court of review.

The Appellate Court affirmed the Chancery Court's ruling. It specifically noted that the law does not permit such a review. Its limitation of the review process to the authorized courts of review is a well-understood principle in the Illinois law.

B.

THE DOCTRINE OF COLLATERAL ATTACK IS DESIGNED TO PREVENT ENFORCEMENT OF A DEMONSTRABLY VOID JUDGMENT, NOT AS AN ALTERNATE AVENUE OF REVIEW.

Plaintiffs' request for relief to the Chancery Court was that it vacate multiple judgments entered in the Municipal Court. The issue presented to the Chancery Court was whether it had the power to vacate the municipal judgments. The Chancery Court could not and did not reach any further issue with regard to those judgments. Similarly, the analysis of the Illinois Appellate Court terminated on that procedural issue.

Plaintiffs misapprehend and consequently misapply the doctrine of collateral attack in arguing that the Chancery Court was empowered to vacate judgments of a court of parallel jurisdiction. Plaintiffs attempt to use the doctrine as an alternate method of review. This application is contrary to existent Illinois law and the strict requirements of appellate procedural rules.

A judgment which is void can be attacked directly in any of the manners outlined by the Illinois Code of Civil Procedure, discussed above. A direct attack must be taken to the court which entered the judgment. The cases cited by the plaintiffs at the Illinois appellate level are illustrative of this principle. For example, in *State Bank of Lake Zurich v. Thill,* 135 Ill. App.3d 747 (1985), the defendant contesting the validity of the judgment entered against him entered a special and limited appearance and asserted that the court lacked personal jurisdiction over him. The special and limited appearance and motion contesting jurisdiction were presented to the same court which entered the judgment. Similarly, in *Just Pants v. Bank of Ravenswood,* 136 Ill. App.3d 543 (1985), a special and limited appearance and motion contesting jurisdiction were presented to the same court which entered the judgment at issue.

Each of the cases cited by the plaintiffs addresses a situation in which either a direct attack against a judgment is taken to the same court which entered the judgment or the judgment is attacked collaterally by the person against whom the judgment is sought to be enforced. The trial court in the case at bar was therefore correct when it stated in its ruling from the bench on

March 29, 1988, denying plaintiff's motion for a reconsideration of the January 27, 1988 *sua sponte* dismissal:

> The cases cited by the plaintiffs do not address the situation presented at the case at bar and are, therefore, distinguishable. In this case, plaintiffs are asking this court to declare void the judgments obtained in a court of parallel jurisdiction. The plaintiffs have not presented one case in which a collateral attack was sustained in such a situation. (March 29, 1988 R.P. 6)

The doctrine of collateral attack is designed to be used as a shield against the enforcement of judgments which are not viable. The use of the doctrine of collateral attack does not vacate a judgment or render it void as a matter of public record. A successful collateral attack simply renders the judgment unenforceable in the proceeding in which it is used and against the person asserting the doctrine. A classic example is found in the Supreme Court case of *Reynolds v. Burns,* 20 Ill.2d 179 (1960). The Illinois Supreme Court described the proper use of a collateral attack in the case before it in *Reynolds,* stating:

> A void judgment can be impeached at any time in any proceeding *whenever a right is asserted by reason of that judgment,* and it is immaterial, in a consideration of the validity of the judgment, whether or not the time for review by appeal has expired (citations omitted). In this case the validity of the judgment is first put in issue when the court is called upon to pass upon the validity of the title of the plaintiffs. *Reynolds v. Burns,* 20 Ill.2d 179, 185 (1960). (emphasis added).

In their petition to this Supreme Court, plaintiffs cite federal case law which defines the concept of collateral attack in a manner consistent with the Illinois law generally and as applied in the instant case. A proper collateral attack "means only that for purposes of the matter at hand the judgment must be deemed without *res judicata* effect. . ., the judgment neither justifies nor bars relief from its consequences." *Schlesinger v. Councilman,* 420 U.S. 738, 746-747 (1975). The federal law does not recognize a collateral attack as an alternate avenue of review or a means of conferring appellate jurisdiction. A collateral attack operates to impeach a judgment, not to vacate it. 420 U.S. 738, 749.

To allow the concept of collateral attack to be used as a sword, allowing one court to vacate the judgment of another court without time limitation, renders the procedural rules set out in the Illinois Code of Civil Procedure insignificant. Moreover, it would run contrary to the original intent of codifying procedure. Plaintiffs' attempt to use the common law doctrine of collateral attack to vacate and nullify Municipal Court judgments is akin to use of the common law writ of *scire facias* to repeal letters patent. The Illinois law specifically abolished that writ, further reflecting the legislative intent that the Code of Civil Procedure govern pending litigation. Ill. Rev. Stat., ch. 110, par. 2-1601 (1982).

Currently, the Illinois law has specific rules with regard to a change of venue from a particular courtroom or judge. The general rules are set out in Section 2-1001 of the Illinois Code of Civil Procedure. Ill. Rev. Stat., ch. 110, par. 2-1001 (1982). If, however, the doctrine of collateral attack can be used as the plaintiffs propose, the one employing the doctrine has a choice of venue in seeking review in a trial court of parallel jurisdiction. The action can be initiated in another division of the same system or another court. The result is blatant forum shopping, an activity which the Code prohibits and on which the Illinois law has always frowned. Ill. Rev. Stat. ch. 110, par. 2-1002 (1982); *Balciunas v. Duff*, 94 Ill.2d 176 (1983).

As the record in the case at bar demonstrates, Mark and Donna Contreras, through their attorney, Peter Regulski, were having difficulty initially convincing the Municipal Court that their motion to vacate the judgment entered against them was meritorious (C 186). After presenting the 2-1301 motion to vacate on October 1, 1987, they sought leave to file prepared, typed documents to pursue a motion to quash (C 189; 192). They did not allow the municipal court to rule on either motion. Ultimately, the Contrerases chose not to pursue their motions at the Municipal level and entered into a settlement agreement. At the time the Contrerases paid their debt to Citibank and dismissed the municipal action by agreement, they had already turned to the Chancery Court as an alternate forum (C 02) asking it to vacate a judgment which they voluntarily paid by settlement (C 747; C 112).

Similarly, Schmidt voluntarily settled the Municipal action against him, obtaining a release and satisfaction of judgment. He took no steps at the Municipal level to quash service under Section 2-301 of the Code or to petition for relief under Section 2-1401. His first and only attempt to vacate the Municipal Court judgment was made in the Chancery Court, after attorney Regulski contacted him as a purported witness to the validity of service on Mark and Donna Contreras.[5] Schmidt did not contest judgment at the municipal level. He settled and obtained a release and satisfaction of judgment (C 299; 177).

At issue in the *Balciunas* case was the modification by a trial judge of a discovery order previously entered by a different judge sitting in the same courtroom. As the Illinois Supreme Court noted in reviewing the modification of the discovery order, the order was interlocutory in nature and the trial court had the requisite jurisdiction to review and modify the first judge's order. However, even though the trial judge was merely reconsidering the order of a prior judge, the Supreme Court noted the problems of forum shopping and imposed a strict standard on reconsideration, stating as follows:

> . . . we think it is particularly appropriate for a judge before whom a motion for reconsideration is pending to exercise considerable restraint in reversing or modifying previous rulings. This is especially true if there is evidence of "judge shopping" or it is apparent that a party is seeking, for delay or abusive purposes, a reconsideration of prior rulings. *Balciunas v. Duff,* 94 Ill.2d 176, 181 (1983).

The case at bar did not involve a motion to reconsider an interlocutory order. Rather, plaintiffs asked the Chancery Court to review multiple final judgments of the Municipal Court. The record discloses intentional forum shopping on the part of Schmidt and the Contrerases. Further, in any instance where a litigant turns to the courts of a separate division for a review of another court's judgment, under the guise of collateral attack, the inference of forum shopping arises.

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[5] Defendant notes that this "fact" is neither of record nor previously referred to by Plaintiff Schmidt in this cause. Further, Schmidt's potential knowledge as to the validity of service on Mark and Donna Contreras is not explained.

The interpretation of the scope of the doctrine of collateral attack by the Chancery Court and the Illinois Appellate Court was proper. The doctrine can not be used as an alternative to appeal and review under the applicable procedural rules. Similarly, the doctrine of collateral attack should not be recognized as a tool to circumvent the specific requirements of Sections 2-1301, 2-1401 and 2-301 of the Illinois Code of Civil Procedure. The Chancery Court correctly held that it was not empowered to vacate the judgments of the Municipal Court or declare them void. The Illinois Appellate Court properly affirmed.

IV.

COUNTS I AND II OF PLAINTIFF'S FIRST AMENDED COMPLAINT WERE FACTUALLY INSUFFICIENT AND FAILED TO STATE A CAUSE OF ACTION UNDER SECTION 1983.

Plaintiffs original Complaint in Chancery was dismissed by the court *sua sponte* on January 27, 1988. At that time, the court commented on several deficiencies in plaintiffs' pleading, in addition to plaintiffs' improper request for the relief of vacating the Municipal Court judgments or declaring them void. After a denial of their motion to reconsider, plaintiffs filed a First Amended Class Action Complaint on April 12, 1988 (C 290 - C 320).

The sufficiency of each of plaintiffs' substantive counts for relief, as well as the impropriety of the nature of the relief requested, was challenged by each of the defendants to this action. Wilk and Waller moved to strike and dismiss each count of plaintiffs' First Amended Complaint by motion filed April 28, 1988 (C 323 - C 332). On July 26, 1988 the court sustained the motion of Wilk and Waller and similar motions filed by the co-defendants, but again granted plaintiffs the opportunity to file an amended pleading (C 411). Two extensions of time to file the second amended pleading were also given to the plaintiffs (C 416, C 421). Plaintiffs ultimately elected not to file a second amended pleading. In lieu thereof, they filed an Election to Stand on the First Amended Complaint and a Motion for a Final Order of Dismissal (C 424 - C 427). Plaintiffs' motion was allowed and, by their own election, Counts I through VII of the First Amended Complaint were dismissed.

There is no question as to the exercise of the Chancery Court's discretion in allowing leave to amend. Every opportunity was extended to the plaintiffs to plead facts in support of their multiple theories of recovery. Leave to file a Second Amended Complaint and an extension of time in which to file a Second Amended Complaint were granted to the plaintiffs. It must be assumed from plaintiffs' election to stand on the First Amended Complaint and the factual allegations contained therein, that they could not in good faith plead further facts in support of their various counts.

In reviewing the sufficiency of plaintiffs' First Amended Complaint, the court reviewed each and every count contained therein, analyzing the facts alleged under the applicable Federal or Illinois law. The court properly applied Illinois pleading law, looking only to the facts plead and rejecting conclusory allegations. *Knox College v. Celotex Corp.*, 88 Ill.2d 407 (1981). The court determined that each count was factually insufficient and failed to state a cause of action. As to each Count, the court's analysis was sound, and consistent with prevailing law. Counts I and II of the plaintiffs' First Amended Complaint are deficient and were properly stricken under Section 2-615 of the Illinois Code of Civil Procedure.

Counts I and II of plaintiffs' First Amended Complaint are both purportedly premised on Section 1983 of 42 U.S.C. Count I is entitled "Conspiracy to Violate Civil Rights" , while Count II repeats the allegations of Count I, eliminating the conspiracy charge[6]. Both Counts wholly fail to state a cause of action.

To allege a good cause of action under Section 1983, a plaintiff must demonstrate that the conduct complained of deprived him of a constitutionally protected right and that the conduct causing the deprivation was fairly attributable to the State. In the case at bar, plaintiffs fail with regard to both essential elements.

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[6] It is unclear from the Petition for Writ of Certiorari whether Plaintiffs intend to bring both counts to this level of review, as they do not argue that the independent actions of this Defendant were under color of state law. Defendant notes that although plaintiffs' arguments focus on the private process servers, Plaintiffs insist on attempting to bring this Defendant and Citibank to this Supreme Court. Therefore, full responsive arguments are submitted.

As the record demonstrates, the Contrerases actually appeared in the underlying municipal action and negotiated a settlement of the claim of Citibank against them. It can hardly be maintained in light of those facts that the Contrerases were denied due process.

Similarly, the remaining representative plaintiff, Robert Schmidt, plead that he settled the cause of action against him by voluntary payment. See paragraph 39 of the First Amended Complaint (C 299). Moreover, Schmidt did not affirmatively plead that he never received service of process or notice of the pending collection action against him. Like the Contrerases, Schmidt plead that he in fact owed the money to Citibank and that he paid it voluntarily.

Deprivation of a constitutionally protected right requires proof of actual injury. A complaint of a denial of procedural due process, absent any allegation of injury sustained, is insufficient to support a claim under 1983. *Carey v. Piphus,* 435 U.S. 247 (1978). Plaintiffs' failure to plead an injury sustained defeats their purported cause of action under Section 1983. They fail to allege facts to support deprivation of a constitutionally protected right.

Plaintiffs also fail to show that the conduct allegedly engaged in was fairly attributable to the State. To demonstrate State action as required under Section 1983, plaintiffs must show that the allegedly wrongful action was a result of the exercise of a State-created right or privilege and that the party charged with the deprivation is a State official or someone whose conduct is otherwise chargeable to the State. *Flagg Bros., Inc. v. Brooks,* 436 U.S. 149 (1978). The allegations of fact in plaintiffs' Counts I and II do not allege the involvement of a State official or other State actor. Therefore, the second element essential to a Section 1983 action is absent. The trial court correctly held that Counts I and II failed to state a cause of action under Section 1983.

A.

THE ALLEGATIONS OF COUNTS I AND II CANNOT SUPPORT A FINDING OF STATE ACTION REQUISITE TO A CAUSE OF ACTION UNDER SECTION 1983.

Each of the defendants charged with liability in this litigation is a private party. Citibank is a business which is presumably

authorized to and does conduct business within the State of Illinois. Wilk and Waller are attorneys, licensed by the State of Illinois to practice law. The Kadet defendants are private individuals engaged in the enterprise of serving summons and subpoenas, commonly known as private process servers. Plaintiffs concede that each of the defendants is a private entity. It is the plaintiffs' position that "misuse of State Statutes" subjects private actors to potential liability under Section 1983 (plaintiffs' petition, page 16). This is clearly contrary to the holdings of the United States Supreme Court.

To support a 1983 action, a plaintiff must show that the deprivation of a Federal right is fairly attributable to the State. A determination of fair attribution or State action is two-fold.

> First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a State actor. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 102 S. CT. 2744, 2753 (1982).

State action is not established by a showing that the State acquiesced in a private action. Where the act of a private party is at issue, the conversion to State action is made only where the statutory scheme of the State has compelled the private action (*Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978)), or where the private party conspired with or acted in concert with State officials. *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970).

Plaintiffs' contention that private misuse of a State Statute does come within the scope of 1983 is clearly erroneous. The Supreme Court of the United States has expressly addressed the issue stating that ". . .private misuse of a State Statute does not describe conduct that can be attributed to the State,. .". *Lugar v. Edmonson Oil Company, Inc.*, 457 U.S. 937, 941 (1982). The court's statement was simply a reiteration of the principle that a constitutional right is only protected against infringement by the government. As the Supreme Court stated in *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 349 (1974):

> In 1883, this court in the *Civil Rights Cases,* 109 U.S. 3 [3 S. Ct. 18, 27 L. ED. 835], affirmed the essential dichotomy set forth in [the 14th] amendment between deprivation by the State, subject to scrutiny under its provisions, and private conduct, "however discriminatory or wrongful" against which the Fourteenth Amendment offers no shield.

The logic is clear. Because the rights protected by the Constitution are protected against deprivation by the government, private individuals do not come within the scope of Section 1983. Plaintiffs' insistence that the Chancery Court in the case at bar misunderstood the scope of Section 1983 and the rationale of the United States Supreme Court cases which interpret it is clearly wrong.

The plaintiffs place heavy reliance on a series of New York cases arising in the early 1970s at the District Court level. The trial court in the case at bar reviewed that line of cases but found their holding implicitly overruled by the consistent later decisions of the United States Supreme Court, which stringently defines the requisites for State action.

The private process server, under applicable Illinois procedural rules, is appointed by the court to serve process. His actions, however, are not thereby controlled by the State, and he attains no official status. His appearance to the outside world carries no indicia of government power. The connection to the State is less than the government appointed public defender found not to be a state actor in *Polk County v Dodson,* 454 U.S. 312 (1981). It is also more tenuous than that asserted in *Rendell-Baker v. Kohn,* 457 U.S. 830 (1982), wherein the United States Supreme Court effectively rejected the public function doctrine as applied in the series of New York cases on which plaintiff relies. The pertinent question is not whether a function which serves the public is being performed. Nor is it controlling that the function is publicly funded. *Blum v. Yaretsky,* 457 U.S. 991 (1982). The proper inquiry in determining State action is whether the function is the *exclusive* prerogative of the State.

Illinois law allows for the service of process by a private person under the current Code provisions. Ill. Rev. Stat. ch. 110, par. 2-202 (1982). Moreover, service of process by a private person

has been contemplated by the Illinois law since 1872. See Ill. Rev. Stat., ch. 110, par. 2-202, Historical Practice Notes.

The case law on which the plaintiffs rely in urging a violation of Section 1983 is outdated. The United States Supreme Court specifically outlines a more stringent approach in analyzing the scope of Section 1983. The trial court properly followed the dictates of the United States Supreme Court and rejected the case authority from the federal district level in holding that plaintiffs' allegations failed to support a finding of State action.

B.

AN ATTORNEY'S ELECTION TO USE A PRIVATE PROCESS SERVER IS ROUTINE AND CANNOT QUALIFY AS STATE ACTION.

Count I labels itself a conspiracy Count. The conclusory nature of the conspiracy allegations will be addressed in the next section of argument. Count II charges each of the defendants individually with a Section 1983 violation. An analysis of that Count with regard to these defendants must focus on their individual actions as attorneys only.

The retention of a private process server is common in the course of litigation. The private process server is used not only for the initial service of summons, but is also retained to serve a deposition subpoena on a witness, or a trial subpoena. The most common use of a private process server in Cook County litigation is for the procurement of records. In virtually every pending action in Cook County, records are procured through the use of a private service, with the server initiating the issuance of the subpoena and following through with the obtainment of records, generally from individuals or companies otherwise uninvolved in the action.

The Illinois attorney is licensed by the State. Those attorneys involved in litigation work within the court system on a daily basis. To pursue or to defend pending litigation, the attorney necessarily interacts with a series of State-employed individuals. It can not be the law that the actions the attorney takes in the course of litigation subject him to potential liability under Section 1983, because of his daily involvement in the court system. Case authority would indicate to the contrary. The conduct of an attorney following the ordinary course of litigation can not be

characterized as State action, even if abuse of the litigation procedure is alleged. *Dahlberg v. Becker,* 748 F.2d 85 (1984). The principle remains applicable even where the attorney is paid by the State. *Polk County v Dodson,* 454 U.S. 312 (1981).

The logic of holding Section 1983 inapplicable to the actions of an attorney is well-founded. To hold otherwise would subject each practicing attorney to potential liability for every court procedure initiated. The liability created would encompass any defective service of process. For example, it would potentially create a Section 1983 action for every Illinois resident a plaintiff improperly attempts to serve *via* the Illinois Secretary of State under the Motor Vehicle Code, a form of service which is only valid on a non-resident. The potential scope of a violation of Section 1983 would not be thus limited. Even a defective notice of motion would fall within its ambit.

The application of Section 1983 is properly limited. It does not and can not apply to the actions of attorneys handling litigation. As every practitioner is aware, service of process is not always letter perfect. It can be served on the wrong corporate entity, to the wrong residence or even the wrong person with the same name as the defendant sought. Section 1983 was not designed to cover the possible irregularities which arise during the course of litigation. *Accord, Lynk v. LaPorte Superior Court No. 2,* 789 F. 2d 554, (1986). The Illinois Code of Civil Procedure was so designed and its provisions outline the various avenues of relief.

Count II of plaintiffs' First Amended Complaint focuses on the individual actions of attorneys engaged in the practice of law. Their actions can never qualify as State action, as that term is defined by the United States Supreme Court. The trial court's dismissal of the 1983 action against them was proper.

C.

COUNT I IS DEVOID OF FACTS TO SUPPORT PLAINTIFF'S CONCLUSORY ALLEGATION OF CONSPIRACY.

Illinois is a fact pleading State. *Knox College v. Celotex Corp.,* 88 Ill.2d 407 (1981). Illinois law will not accept conclusory allegations in a pleading. In reviewing the sufficiency of a Complaint, the court must look to the facts alleged and not the

conclusions of law contained therein. *Gartley v. Chicago Housing Authority,* 28 Ill. App.3d 705 (1975). The trial court properly applied the Illinois pleading standard in reviewing plaintiffs' Count I and holding it factually insufficient with regard to the allegations of conspiracy.

Plaintiffs' allegations that a conspiracy existed amongst the various defendants charged is set forth in wholly conclusory terms. Plaintiffs do not deny that they fail to support their allegations of conspiracy with allegations of fact. Rather, plaintiffs urged the Illinois courts to focus on the alleged individual actions of each of the defendants charged and work backwards to infer an agreement. The standards of Illinois pleading clearly require more.

Conspiracy is a precise term. It requires actual agreement before the execution of the act agreed upon. Factual allegations to support an agreement are absent in the case at bar. Merely conclusory allegations are insufficient. *Panorama of Homes, Inc. v. Catholic Foreign Missions Society, Inc.,* 84 Ill. App.3d 142 (1980). Plaintiffs are incorrect in asserting that a conspiracy can be inferred. *Skolnick v. Nudelman,* 71 Ill. App.2d 424 (1968). Conspiracy, means something more than the opportunity to correct the possible error of another. The term encompasses an intentional agreement to do harm and an execution of that agreement. The facts alleged by the plaintiffs are insufficient to support conspiracy.

Plaintiffs assert that mere use of the court system is sufficient to support the charge of conspiracy, relying on *Mabe v. City of Galveston Park,* 635 F.Supp. 105 (1986). The holding of Mabe defeats plaintiffs' argument. The *Mabe* court explicitly states that "merely resorting to court" is insufficient to constitute conspiracy. 635 F.Supp. 108. Like the Illinois law, federal law requires an agreement before the fact to support a charge of conspiracy.

It is significant that the trial court extended plaintiffs the opportunity to plead over and buttress their conclusory allegations with additional allegations of fact. Plaintiffs elected not to tender a second amended pleading. In electing to stand on their First Amended Complaint, plaintiffs effectively advised the Trial Court that they could plead no further facts. The Trial Court correctly held their charge of conspiracy to be factually insufficient.

CONCLUSION

Review of the decision of the First District Appellate Court is not warranted. The issue on which this case was decided was procedural in nature. The rules of law followed by the Chancery Court and the First District Appellate Court are well accepted. A litigant must follow the codified rules of civil procedure in conducting civil litigation. A litigant is not allowed to shop for a judge or a forum. Finally, a trial court is not empowered to sit as a court of review. The power to review a trial court's decision is limited to the Appellate Courts and Supreme Court of the State of Illinois.

No question of federal or constitutional law is posed by the instant appeal. There are no conflicts between the decision rendered by the First District Appellate Court and any decision of this Supreme Court. Plaintiffs' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Section 2-301 **Special appearance.** (a) prior to filing any other pleading or motion, a special appearance may be made either in person or by attorney for the purpose of objecting to the jurisdiction of the court over the person of the defendant. A special appearance may be made as to an entire proceeding or as to any cause of action involved therein. Every appearance, prior to judgment, not in compliance with the foregoing is a general appearance.

(b) If the reasons for objection are not apparent from the papers on file in the case, the special appearance shall be supported by affidavit setting forth the reasons. In ruling upon the objection, the court shall consider all matters apparent from the papers on file in the case, affidavits submitted by any party, and any evidence adduced upon disputed issues of fact. No determination of any issue of fact in connection with the objection is a determination of the merits of the case or any aspect thereof. A decision adverse to the objector does not preclude the objector from making any motion or defense which he or she might otherwise have made.

(c) If the court sustains the objection, an appropriate order shall be entered. Error in ruling again the defendant on the objection is waived by the defendant's taking part in further proceedings in the case, unless the objection is on the ground that the defendant is not amenable to process issued by a court of this State.

Ill. Rev. Stat., ch 110, par. 2-301 (1982)

Section 2-1301 **Judgments - Default - Confession.**

(portions deleted)

(e) The court may in its discretion, before final order or judgment, set aside any default, and may on motion filed within 30 days after entry thereof set aside any final order or judgment upon any terms and conditions that shall be reasonable. Ill. Rev. Stat., ch 110, par. 2-1301(e) (1983)

Section 2-1401 **Relief from judgments.** (a) Relief from final orders and judgments, after 30 days from the entry thereof, may

be had upon petition as provided in this Section. Writs of error coram nobis and coram vobis, bills of review and bills in the nature of bills of review are abolished. All relief heretofore obtainable and the grounds for such relief heretofore available, whether by any of the foregoing remedies or otherwise, shall be available in every case, by proceedings hereunder, regardless of the nature of the order or judgment from which relief is sought or of the proceedings in which it was entered. There shall be no distinction between actions and other proceedings, statutory or otherwise, as to availability of relief, grounds for relief or the relief obtainable.

(b) The petition must be filed in the same proceeding in which the order or judgment was entered but is not a continuation thereof. The petition must be supported by affidavit or other appropriate showing as to matters not of record. All parties to the petition shall be notified as provided by rule.

(c) The petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.

(d) The filing of a petition under this Section does not affect the order or judgment, or suspend its operation.

(e) Unless lack of jurisdiction affirmatively appears from the record proper, the vacation or modification of an order or judgment pursuant to the provisions of this Section does not affect the right, title or interest in or to any real or personal property of any person, not a party to the original action, acquired for value after the entry of the order or judgment but before the filing of the petition, nor affect any right of any person not a party to the original action under any certificate of sale issued before the filing of the petition, pursuant to a sale based on the order or judgment.

(f) Nothing contained in this Section affects any existing right to relief from a void order or judgment, or to employ any existing method to procure that relief. Ill. Rev. Stat., ch. 110, par. 2-1401 (1982)

Section 2-1601 **Scire facias abolished.** Any relief which heretofore might have been obtained by scire facias may be had by employing a petition filed in the case in which the original judgment was entered, and notice shall be given in accordance with rules.

Ill. Rev. Stat., ch. 110, par. 2-1601 (1982)